ORISSA HIGH COURT, CUTTACK.

Jail Criminal Appeal No. 78 of 2003

Arising out of the Judgment of conviction and order of sentence dated 10.07.2003 passed by Shri K.C. Pattanaik, learned Sessions Judge, Koraput-Jeypore in Sessions Case No.362 of 1999, under Section 302/34, I.P.C.

Guru Muduli … **Appellant**

Versus

State of Orissa … **Respondent**

AND

Jail Criminal Appeal No. 13 of 2008

Arising out of the judgment of conviction and order of sentence dated 22.12.2006 passed by Sri S.Pujahari, Sessions Judge, Koraput-Jeypore in C.T. No.97 of 2005, under Section 302, I.P.C.

Kuma Muduli @ Paraja … **Appellant**

Versus

State of Orissa … **Respondent**

For Appellants : M/s. Manoj Kumar Mohanty – 2 and A.K. Rao.
(in JCRLA No.78 of 2003)

Mr. Gyanendra Chandra Swain.
(in JCRLA No.13 of 2008)

For Respondents : Mr. Sangram Das, Addl. Standing Counsel.
(in both the Appeals)

P R E S E N T :

THE HONOURABLE MR. JUSTICE L. MOHAPATRA
AND
THE HONOURABLE MR. JUSTICE C.R. DASH

Date of Argument : 11.04.2012 Date of Judgment : 11.04.2012

C.R. Dash, J. As both the Jail Criminal Appeals arise out of the same transaction, they are taken up together for disposal by this common judgment.

2. Learned trial court in Sessions Case No.362 of 1999 (hereinafter referred to as 'first trial' for convenience) found the present appellant Guru Muduli @ Paraja and one Kuma Muduli @ Paraja guilty of the offence under Section 302/34, I.P.C. and sentenced each of them to suffer imprisonment for life and to pay fine of Rs.5,000/- (five thousand) each, in default, to suffer R.I. for one year more. They preferred Jail Criminal Appeal No.78 of 2003.

3. In course of hearing of the aforesaid Jail Criminal Appeal, a report was received from the Sessions Judge, Koraput (Trial Judge) to the effect that Kuma Muduli @ Paraja, who was tried, convicted and suffering sentence in S.C. No.362 of 1999 ('first trial') is actually Hari Muduli (brother of Kuma Muduli) and not Kuma Muduli @ Paraja. On consideration of the report of learned Trial Judge and the Superintendent of Police, Koraput, this Court was satisfied that a wrong person, i.e. Hari Muduli is suffering sentence in place of Kuma Muduli @ Paraja (the real culprit) by impersonating said Kuma Muduli. Accordingly, this Court kept the Jail Criminal Appeal No.78 of 2003 pending so far as Guru Muduli @ Paraja is concerned and acquitted Hari

Muduli, who was suffering sentence as Kuma Muduli. This Court also directed the trial of the real accused Kuma Muduli @ Paraja.

4. On the basis of the aforesaid direction of this Court in Jail Criminal Appeal No.78 of 2003, Kuma Muduli was tried vide C.T. No.97 of 2005. He was convicted under Section 302, I.P.C. and was sentenced to suffer imprisonment for life and to pay a fine of Rs.2,000/-, in default, to suffer R.I. for six months more. Jail Criminal Appeal No.13 of 2008 is directed against the judgment and order of sentence passed in Criminal Trial No.97 of 2005 (hereinafter referred to as 'second trial' for convenience).

5. Prosecution case relevant for both the appeals is as follows :-

The occurrence happened at about 6.00 A.M. on 21.04.1999. Informant Mangaladei Kandhapan (P.W.1) is the widow of the deceased Manik Kandhapan. She lodged F.I.R. scribed by one Bhaskar Chandra Mahanandia (P.W.4). It is alleged in the report that at the relevant time on 21.04.1999 Guru Muduli (appellant in JCRLA No.78 of 2003) and Ghasi Paika (acquitted by learned trial court) came near her house and dragged her husband Manik Kandhapan (deceased) catching hold of his hand and tuft of hair. She protested. Striping him (deceased) of the towel ('gamuchha') he was wearing, they tied his hands by that towel ('gamuchha') and started dragging him again. She (informant) appealed to them in a weeping state not to torture him in such a manner. Declaring that they will kill her husband, they asked her (P.W.1) not to follow them. In such manner they took the deceased for about two kilometers and thereafter they started assaulting him declaring that if he is left alive, he may create trouble for them. At that time one Jena Master (Kartik Kumar Jena), who happened to pass across them,

suggested the culprits to cut his hand, otherwise he may harass them in future. All of a sudden, Guru Muduli (appellant in JCRLA No.78 of 2003) and Ghasi Paika (since acquitted) severed the right hand of the deceased with a 'Tangia'. In a weeping state the informant brought her husband to a little distance and then came to her village to call her brother Thudu Takri (not examined). She also called other villagers. On lodging of the report, Udaya Kumar Tuduk, A.S.I. of Dasamantapur P.S. registered the P.S. Case and took up initial investigation. Subsequently on the same day, i.e. on 21.04.1999 at about 11 P.M. Harihar Sahu, O.I.C., Dasamantapur P.S. took charge of the investigation and on completion of the investigation, submitted charge-sheet implicating Guru Muduli (appellant in JCRLA No.78 of 2003) and Kuma Muduli @ Paraja (appellant in JCRLA No.13 of 2008) implicating them in the offence under Section 302, I.P.C.

6. It is pertinent to mention here that during investigation, informant Mangaladei Kandhapan told before the Investigating Officer that he had named Ghasi Paika wrongly though two brothers of village Banjaguda had come to her house. The I.O., on the basis of his investigation, arrested and forwarded Kuma Muduli, who later on turned to be Hari Muduli (brother of Kuma Muduli).

7. Prosecution examined seven witnesses in the 'first trial' and nine witnesses in the 'second trial'. Mangaladei Kandhapan, the informant was examined as P.W.1 in both the trials. Bhaskar Chandra Mahanandia, the Scribe of the F.I.R. was examined as P.W.4 in both the trials. Trilochan Das, who is a Constable, was examined as P.W.6 in both the trials. Gori Khora, one of the eye-witnesses to the occurrence was examined as P.W.2 in the first trial and P.W.7 in the second trial. Kara Kandhapan, who is son of the

deceased and P.W.1 and a witness to the part of the occurrence, was examined as P.W.3 in the first trial and P.W.2 in the second trial. Dhabaleswar Dalapati, who is a seizure witness, was examined as P.W.5 in the first trial and P.W.3 in the second trial. The Medical Officer, who had conducted autopsy on the dead body of the deceased, was not examined in the first trial, but he was examined as P.W.9 in the second trial. Udaya Kumar Tuduk, the initial I.O. was not examined in the first trial, but he was examined as P.W.5 in the second trial. Harihar Sahu, the I.O. was examined as P.W.7 in the first trial and P.W.8 in the second trial.

8. Defence plea in both the trials is complete denial of the charge, but none was examined by the defence in the trials.

9. It is worthwhile to mention here that in the first trial Mangaladei Kandhapan and Gori Khora were examined respectively as P.Ws.1 and 2 on 30.07.2001. P.W.1 in her evidence in course of her examination implicated a local teacher named Jena Master (Kartik Kumar Jena) and also Ghasi Paika (since acquitted). P.W.2 however implicated the aforesaid Ghasi Paika including Guru Muduli @ Paraja and Kuma Muduli @ Paraja. She (P.W.2) also implicated aforesaid Jena Master.

In view of such evidence, learned Public Prosecutor filed a petition under Section 319, Cr.P.C. to implicate the aforesaid Ghasi Paika and Jena Master as accused persons. On the basis of the order passed by learned Sessions Judge, aforesaid Jena Master (Kartik Kumar Jena) and Ghasi Paika were arrayed as accused persons. Trial was resumed again. P.Ws.1 and 2 were examined again on 16.07.2002 for the second time. Relying on the evidence of P.Ws.1, 2 and 3, as adduced by them, after Kartik Kumar Jena and Ghasi Paika stood trial, learned Trial Court convicted Guru

Muduli @ Paraja and Kuma Muduli @ Paraja under Section 302/34, I.P.C., but acquitted Ghasi Paika and Jena Master (Kartik Kumar Jena).

10. Learned counsels for the appellants in both the Jail Crl. Appeals, submit that except Mangaladei Kandhapan (P.W.1) there is no eye-witness to the occurrence and even Mangaladei Kandhapan cannot be believed as an eye-witness in view of her prevaricative evidence and improvement from time to time on the point of identification of the assailants.

Learned Addl. Standing Counsel on the other hand submits that the evidence of the eye-witnesses namely Mangaladei Kandhapan, Gori Khora and Kara Kandhapana being consistent, there is no justification to interfere with the impugned judgments in both the appeals.

11. Prosecution has examined Mangaladei Kandhapan, Gori Khora and Kara Kandhapan as eye-witnesses to the occurrence. It is now clear and admitted fact at the Bar that the person, who was standing trial in the Court as Kuma Muduli @ Paraja was actually his brother Hari Muduli @ Paraja. All the aforesaid three witnesses examined as P.Ws.1, 2 and 3 in the 'first trial' identified Guru Paraja and aforesaid Hari Muduli as Kuma Muduli in the dock. P.W.3 in his evidence has specifically testified that he did not follow his father, but his mother followed his deceased father. Such evidence of P.W.3 in the examination-in-chief itself shows that he has not seen the occurrence of fatal assault on his father by the assailants, but has seen the initial part of the incident when two of the assailants came to his house and dragged his father to the other side of river Sakara, whom his (P.W.3's) mother P.W.1 followed. Gori Khora (P.W.2) has testified that he followed P.W.1, son of P.W.1 also accompanied them and he saw Guru Muduli @ Paraja catching hold of the hands of the deceased and Kuma Muduli @ Paraja severing the right hand of

the deceased from the rest of his body by means of an axe. The defence confronted to Gori Khora (P.W.2), his earlier statement recorded under Section 161, Cr.P.C., but in paragraph-3 of his cross-examination he (P.W.2) denied the suggestion of the defence and stated it is not a fact that he had not stated before the I.O. that he and son of P.W.1 followed the accused and the deceased. On cross reference to the evidence of the I.O. (P.W.7), in paragraph-8 of his cross-examination it is found that Gori Khora (P.W.2) had not stated before him (the I.O.) that he had seen the fatal assault on the deceased by Guru Muduli and Kuma Muduli (convicts) and that he had stated that from the villagers of Banjaguda he heard that the accused persons had cut the hands of the deceased. Such a fact amounts to contradiction under Section 145 of the Evidence Act, and Gori Khora (P.W.2) cannot also be believed as an eye-witness so far as the fatal assault is concerned. Further, P.W.2 is to be disbelieved as an eye-witness in as much as contradicting Kara Kandhapan (P.W.3) he (P.W.2) has testified that he and Kara Kandhapan had followed the accused persons and the deceased. Mangaladei Kandhapan (P.W.1), who has described as to how she brought the deceased after the assault, has also not testified about presence of Gori Khora (P.W.2) at the spot. If Gori Khora (P.W.2) would have been present to see the fatal assault, P.W.1 Mangaladei Kandhapan must have seen him at the spot. In view of such evidence, we are constrained to hold that P.Ws.2 and 3 Gori Khora and Kara Kandhapan respectively are not the eye-witnesses so far as the incident of fatal assault is concerned.

12. P.W.2 in his evidence dated 30.07.2001 has testified thus :-

> "……..On that day in the morning while P.W.1 and the deceased were sitting on the verandah of their house, both the accused persons and one Ghasi Paik reached

> there. They dragged the deceased across the Sakara river. ……"

He (P.W.2) in her deposition recorded on 16.07.2002 has testified thus :-

> "The deceased was sitting on the verandah of his house. Accused Guru came and dragged him. At that time accused Kuma also came and both of them took the deceased by lifting him. They took the deceased to the other side of river Sakara…."

On both the occasions, P.W.2 has identified Hari Muduli as Kuma Muduli and by both the accused means he was indicating Guru Paraja and Hari Muduli (not Kuma Muduli).

P.W.3 in his evidence on this aspect has stated thus :-

> "At the time of occurrence, Guru Paraja and Kuma Paraja came to our house and dragged my father and took him to the other side of the river Sakara. Out of fear I have not followed my father but my mother followed my deceased father. …."

P.W.3 has also identified Hari Muduli as Kuma Muduli in the dock. Whether they (P.Ws.2 and 3) should be held to have corroborated P.W.1 on this aspect (transaction at the initial stage) shall be discussed later.)

13. Mangaladei Kandhapan (P.W.1) is therefore the sole eye-witness so far as the occurrence is concerned. In course of her examination on 30.07.2001, this witness has testified thus :-

> "Kuma Paraja assaulted my husband's right hand by means of an axe, as a result of which the hand was severed from the body. The other two persons Ghasi Paika and Guru Muduli caught hold of the hands of the deceased when Kuma assaulted him on the right hand…"

In course of her examination on 16.07.2002, P.W.1 has testified thus :-

> "Accused Guru Poroja caught hold of the right hand of my husband and accused Kumo dealt a Tangia blow to the right hand of my husband, as a result of which his writ was severed…."

The disquieting feature of the evidence of P.Ws.1 and 2 is that both of them in an unition have implicated Ghasi Paika and Jena Master (Kartik Kumar Jena) in the first go and in the second occasion they are conspicuously silent about implication of the aforesaid Jena Master and Ghasi Paika. P.W.1 lodged F.I.R. against Guru Paraja and Ghasi Paika. She and P.W.2 implicated Ghasi Paika, Kuma Muduli and Guru Muduli @ Paraja besides one Jena Master in course of their first examination in the Court. At that time Hari Muduli was standing trial in place of Kuma Muduli. All the witnesses including P.W.1 identified Hari Muduli as Kuma Muduli. Though Hari Muduli and Kuma Muduli are brothers, such mis-identification of a person by all the witnesses makes us to doubt regarding identification of the real assailants. We find reinforcement for such doubt from the evidence of Kara Kandhapan (P.W.3), who has testified thus :-

> "My mother told me that the villagers of Panjiaguda cut the hand of my father…."

If P.W.1 saw Guru Muduli @ Paraja and Kuma Muduli @ Paraja severing the hands of her husband, she would not have implicated the villagers of Panjiaguda before her son (P.W.3). Such a fact goes a long way to doubt as to who were the real assailants and as to whether P.W.1 as the sole eye-witness should be believed on the point of implication of the appellants.

14. From the manner in which F.I.R. was lodged against Guru Muduli @ Paraja and Ghasi Paika, the manner in which Kuma Muduli @ Paraja was brought on record, the manner in which Hari Muduli was arrested and made to stand trial in place of Kuma Muduli, whom the witnesses identified as Kuma Muduli in the dock, a genuine doubt as to whether the witnesses had knowledge about the name of the real assailants or whether they had acquaintance with them (assailants) hunts our mind and ingenuity. Our doubt deepens further, as Mangaladei Kandhapan (P.W.1) in her evidence in C.T. No.97 of 2005 (cross-examination, para-6) has testified thus:

> "Aforesaid Kuma Muduli and Guru Muduli do not belong to our village. Therefore, I had no previous acquaintance with them."

She has further testified in the said cross-examination that –

> "It is a fact that during investigation of this case, after the police arrested the accused Kuma, they showed him to me telling that he was Kuma Muduli and, so, I came to know that he is Kuma Muduli."

Such evidence of P.W.1 in the second trial shows that as she had mis-identified Hari Muduli as Kuma Muduli, Kuma Muduli on being arrested was shown to her by the police. All the aforesaid facts go a long way to indicate that P.W.1 had no idea as to who are the assailants, who came and took her husband and severed his hand.

15. From the report of the learned Sessions Judge, Koraput-Jeypore submitted in JCRLA No.78 of 1993, though not a part of the evidence, is relevant for our discussion in as much as it shows that Hari Muduli and Kuma Muduli are two brothers. But Hari Muduli impersonating

himself as Kuma Muduli stood trial, convicted and was suffering the sentence. Evidence of P.W.7, during the first trial, assumes relevance, because he (P.W.7) in his cross-examination during first trial, in paragraph-7, has testified that the informant (P.W.1) had stated before him during investigation that two persons came to her house and they were Guru Muduli and Kuma Muduli; both are brothers and belong to village Banjaguda and that in her report on the previous day she had mentioned the name of Ghasi Paika by mistake under the impression that Ghasi Paika is the brother of Guru Muduli @ Paraja. Admittedly, Guru Muduli @ Paraja and Kuma Muduli @ Paraja are not brothers, in as much as the I.O. (P.W.7) in paragraph-7 of his cross-examination has further testified that the father's name of Guru Paraja @ Muduli is Kalia Paraja @ Muduli, but the father's name of Kuma Muduli is late Ladia Muduli. At the cost of repetition we again refer to the evidence of Kara Kandhapan (P.W.3), who is none other than the son of the deceased and P.W.1. He (P.W.3) in clear term has testified during the first trial that his mother told him that the villagers of Panjiaguda cut the hands of his father. All the aforesaid facts taken together raise a genuine doubt about the identification of the assailants, though P.W.1 in the F.I.R. had named Guru Paraja as the assailant.

16. On perusal of the record, we happened to glance at column-9 of the Inquest Report. We are conscious of the fact that inquest report is not a piece of substantive evidence nor it is a document which requires mentioning of the name of the assailants. We are further conscious of the fact that the inquest report having not been confronted to the witnesses, who had given their opinion and the I.O., the same cannot be taken into consideration as substantive evidence; but regard being had to the

disquieting features in the evidence and the doubt as to whether the witnesses had knowledge about the assailants, we may look into the same to test the veracity of the evidence as adduced by the witnesses. The inquest report shows that P.W.1 Mangaladei Kandhapan and P.W.3 Kara Kandhapan are witnesses to the inquest. In column-9 of the inquest report meant for opinion of the witnesses as to cause of death, it is opined that the witnesses (P.Ws.1 and 3) came to know that Guru Muduli @ Paraja and Ghasi Paika along with others having severed the hand of the deceased, he died. *("JAANIBAKU PAAILU JE GURU PARAJA O GHASI PAIKA ANYA MAANANKA SAAHAJYARE TANGIARE HAATA KAATI DEBARU, MUTAFA MARIGALA.").* Such a fact, as reflected in the inquest report, is indicative of the fact that P.W.1 has not seen the occurrence and, besides the persons named, some others were also there at the spot to assault the deceased. If we take the entire evidence into consideration, it is doubtful as to who had come to the house of P.W.1 in the morning and whether they have been properly named and identified by the witnesses P.Ws.1, 2 and 3. P.Ws.2 and 3 having wrongly identified Hari Muduli as Kuma Muduli in course of the 'first trial', their evidence on the point of implication of the appellants, so far as the initial transaction is concerned, becomes also doubtful and infirm. No conviction on the basis of evidence of an infirm witness like P.W.1 as corroborated by two infirm witnesses like P.Ws.2 and 3 can be based. P.W.2 like P.W.1 has made improvement from stage to stage. The explanation of the witnesses during 'second trial' to the effect that they mistook Hari Muduli to be Kuma Muduli during the 'first trial' as their appearance resembles, is a weak explanation to be digested in view of our discussions supra.

17. True it is that the witnesses are rustic and tribals; but we also cannot lose sight of the fact that the standing of the appellants is no better. They are also rustic and tribals. When there is doubt regarding identification of the assailants; when a wrong person has already been convicted and suffered a part of the sentence on the basis of wrong identification in the dock, when there is improvement from stage to stage on the point of implications of different persons and when the evidence is prevaricative and striking at the very ring of the truth surrounding the entire transaction, we loathe to find the appellants guilty of the offence under Section 302, I.P.C.

18. In the result, both the Appeals are allowed. Conviction of the appellant Guru Muduli @ Paraja under Section 302/34, I.P.C. in Sessions Case No.362 of 1999 and conviction of appellant Kuma Muduli @ Paraja under Section 302, I.P.C. in C.T. No.97 of 2005 of the Court of learned Sessions Judge, Koraput-Jeypore are set aside. The appellants being stated to be on bail, they be discharged of the bail bonds executed in their respective Sessions Trial.

.....
C.R. Dash, J.

.....
L. Mohapatra, J.

Orissa High Court, Cuttack.
The 11th day of April, 2012. /*Parida.*